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Attorneys for Defendant
YEVGENIY ALEXANDROVICH NIKULIN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

YEVGENIY ALEXANDROVICH NIKULIN,

Defendant.

No. CR-16-00440 WHA

**DEFENDANT’S MOTION IN LIMINE
NO. 2 TO EXCLUDE PRIOR BAD ACT
EVIDENCE, BAD CHARACTER
EVIDENCE, AND PRIOR CRIMINAL
CONVICTIONS PURSUANT TO FED
R. EVID. 404(b), 608 AND 609.**

INTRODUCTION

Defendant YEVGENIY ALEXANDROVICH NIKULIN (“Mr. Nikulin”) is charged by indictment with three counts of computer intrusion (Counts One, Four, and Seven), in violation of

1 18 U.S.C. § 1030(a)(2)(C); two counts of intentional transmission of information, code, or
 2 command, causing damage to a protected computer (Counts Two and Eight), in violation of 18
 3 U.S.C. § 1030(a)(5)(A); two counts of aggravated identity theft (Counts Three and Nine), in
 4 violation of 18 U.S.C. § 1028A(a)(1); one count of trafficking in unauthorized access devices
 5 (Count Six), in violation of 18 U.S.C. § 1029(a)(2); and one count of conspiracy (Count Five), in
 6 violation of 18 U.S.C. § 371.
 7

8 A pretrial conference is set in this case for February 26, 2020 with a jury trial set for March
 9 9, 2020.

10 MEMORANDUM OF POINTS AND AUTHORITIES

11 The defense moves *in limine* to preclude the government from introducing at trial any
 12 evidence of a prior bad act, bad character and/or criminal convictions pursuant to Federal Rules of
 13 Evidence 404(b), 608, and 609.
 14

15 To date, the government has not noticed the defense of bad acts, bad character, or criminal
 16 convictions and were any of this evidence to arise, the defense seeks to exclude such evidence from
 17 trial.
 18

19 “Rule 404(b) provides that the district court may admit evidence of prior bad acts if it (1)
 20 tends to prove a material point; (2) is not too remote in time; (3) is based upon sufficient evidence;
 21 and, (4) in some cases, is similar to the offense charged.” *U.S. v. Banks*, 514 F.3d 959, 976 (9th Cir.
 22 2008) (internal quotation marks omitted). As the party seeking admission, the government bears the
 23 burden of showing that the other-act evidence meets the four criteria. *U.S. v. Ramirez-Robles*, 386
 24 F.3d 1234 (9th Cir. 2004). To do so, “the government ‘must articulate precisely the evidential
 25 hypothesis by which a fact of consequence may be inferred from the other acts evidence. *U.S. v.*
 26 *Mayans*, 17 F.3d 1174, 1181(9th Cir. 1994); *see also, Ramirez-Robles*, 386 F.3d at 1243 (holding
 27
 28

1 that evidence of prior conviction should have been excluded and noting the district court did not
2 make a “focused determination of relevance.”)

3 The Ninth Circuit has repeatedly noted the limitations in Rule 404(b) are “designed to
4 avoid the danger that the jury will punish the defendant for offenses other than those charged, or at
5 least that it will convict when unsure of guilt, because it is convinced that the defendant is a bad
6 man deserving of punishment.” *U.S. v. Hill*, 953 F.2d 453,457 (9th Cir. 1991); *see also, U.S. v.*
7 *Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994) (noting the reluctance to sanction the use of other acts
8 evidence “stems from the underlying premise of our criminal justice system, that the defendant
9 must be tried for what he did, not for who he is.”)

11 Furthermore, “even if the proffered evidence satisfies these requirements [of Rule
12 404(b)], the district court should decline to admit it [under Rule 403] if its probative value is
13 substantially outweighed by the danger of unfair prejudice.” *Banks*, 514 F.3d at 976 (internal
14 quotation marks omitted). Additionally, FRE 403 permits the Court to refuse the admission of
15 relevant evidence if it will confuse the issues, mislead the jury, cause undue delay, or waste time.

17 CONCLUSION

18 Based on the foregoing, Mr. Nikulin respectfully requests that this Court exclude any prior
19 bad act evidence, bad character, and/or prior convictions at his jury trial.
20

21
22 DATED: January 29, 2020

23 /s/ Adam Gasner
24 Adam G. Gasner, Esq.
25 Attorney for Defendant
26 YEVGENIY ALEXANDROVICH NIKULIN

27 DATED: January 29, 2020

28 /s/ Valery Nechay
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